IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1942

WALTER GOLDBERG and ROSALIE GOLDBERG, as Co-Personal Representatives of the Estate of JILL HEATHER GOLDBERG, deceased,

Petitioners,

vs.

FLORIDA POWER & LIGHT CO.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

# PETITIONERS' BRIEF ON JURISDICTION

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## I. STATEMENT OF THE CASE AND FACTS

After a lightning storm dropped a power line in the backyard of a residence near an exceptionally dangerous major intersection in a busy residential area of the Village of Pinecrest, FPL sent six trucks and seven employees to repair it.[1/] A police officer arrived and offered assistance, but because the downed line was deenergized, he was sent away. After planning the repair for more than two hours, it was determined that, for the safety of FPL's employees, an additional line should be deenergized to prevent a "backfeed" on the downed line. A lineman therefore went to a pole located a short 100 feet or so from and in plain view of the traffic lights controlling the intersection, and he opened the fuse on the additional line. In the process, he deactivated the traffic lights. There was ample evidence that he knew, or in the exercise of reasonable care should have known, that his deliberate action rendered the traffic lights inoperable. It was dusk, during rush hour, and raining at the time. (A. 3-4, 6, 8, 12-13, 15-20).

There were a number of simple and sensible things that could have been done to protect or warn motorists approaching the now-uncontrolled intersection. The Village could have been notified of the planned outage, and it would have sent a police officer to direct traffic and provided portable four-way stop signs that it kept for that purpose. FPL employees could have directed traffic. FPL could have stationed a

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[1/] The decision sought to be reviewed consists of three opinions: the initial panel's majority opinion and concurring opinion, and the en banc court's opinion. The latter opinion reached the merits by "viewing, as required, the facts set out in the panel opinions in a light most favorable to the plaintiffs" (A. 21). Our statement of the case and facts is therefore properly taken from the face of the panel's opinions.

truck or two at the intersection with lights flashing. Flares and cones were available in FPL's trucks and could also have been placed in the roadways. Although FPL was concerned with the safety of its own employees, it did none of these things. Instead, its employees ignored the danger they had created, stayed in the residence's backyard, and left the rush-hour motorists to fend for themselves. (*Id.*).

In the late evening, Rosalie Goldberg was approaching the intersection from the south in the rain, with her 12-year old daughter Jill in the passenger seat. Overhanging tree branches prevented her from seeing one of the two inoperable traffic signals controlling northbound traffic, and because of the severely reduced visibility conditions, she did not see the other. Her line of sight across the southwest corner of the intersection was also blocked by a homeowner's wall, trees, and a pole. Traffic was heavy; and unaware of the inoperable traffic lights, she followed a steady stream of northbound vehicles into the intersection. At the same time, Cynthia Sollie, who had approached the intersection from the west, was stopped behind the intersection's stop bar. Because of the wall, the trees, and the pole on the southwest corner, she could not see northbound vehicles until one second before they arrived in the intersection. Detecting what she thought was a break in the traffic, she pulled forward and struck the rear of Ms. Goldberg's vehicle, causing it to slide on the wet pavement into the lane of oncoming traffic, where it was struck in the passenger door by a southbound vehicle. Jill was killed in the low speed collision. (*Id.*).

In the wrongful death action that followed, the jury found that FPL was a negligent cause of Jill's tragic death. It also found that both drivers had exercised reasonable

care under the "confusing, unusual and deceiving" circumstances confronting them (A. 16). FPL's post-trial motions were denied by the Honorable Juan Ramirez, Jr., in a lengthy order (A. 3-14). Relying upon *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992), he rejected FPL's contention that it owed no duty of care, concluding instead that it had a duty to protect or warn motorists of the dangerous condition it had created when it deliberately disabled the traffic lights (A. 6). Relying upon *McCain* once again, he further concluded that, given the adverse conditions confronting the motorists, the accident was "entirely foreseeable," rather than a "bizarre occurrence," and that the evidence was therefore sufficient to support the jury's finding of fact on the issue of proximate causation (A. 7-8).

The panel that initially heard FPL's appeal (Judges Cope, Goderich, and Shevin) agreed with Judge Ramirez and quoted his post-trial order in full. Relying upon *McCain*, it added: " . . . [T]he FPL employee's conduct, in disabling the light, created a foreseeable zone of risk to the driving public . . . . FPL had a duty to exercise reasonable care to protect the motorists it placed at risk by this conduct" (A. 15, 17). And relying upon both *McCain* and *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987), it also agreed that, given the adverse conditions, the accident was foreseeable, rather than "utterly unpredictable," and that the evidence was therefore sufficient to support the jury's finding of causation (A. 15, 19).

Five members of an abbreviated en banc court (Judges Schwartz, Levy, Gersten, Green, and Fletcher) -- with the initial panel dissenting -- disagreed with their brethren and concluded in a very cursory opinion (per J. Schwartz) that FPL was entitled to a

judgment in its favor *as a matter of law* (A. 21-22).[2/] First, the majority held that, "[u]nder *Martinez* [*v. Florida Power & Light Co.*, 785 So.2d 1251 (Fla. 3d DCA 2001), *review pending*], . . . the power company owed no common law duty . . . to the decedent to maintain current in the traffic light . . ." (A. 21). Whether the panel erred in its conclusion on the real issue in the case -- whether FPL owed the quite different duty to protect or warn motorists of the dangerous condition it created when it disabled the lights -- was simply not addressed.[3/]

The majority also followed a trilogy of Third District decisions holding that intersection collisions that occur when traffic lights are inoperative are unforeseeable as a matter of law and the actions of the drivers are therefore an "efficient intervening cause," and held that "no negligence with respect to the operation of the traffic light could have been a legal or proximate cause of the accident because it was causally superseded by the actions of the drivers . . ." (A. 21). In our judgment, both of these conclusions are legally indefensible. It remains for us to demonstrate that the Court has jurisdiction to review the decision and make that pronouncement itself.

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[2/] As a practical matter, the vote was 5-4. Although Judge Ramirez was recused because he was the trial judge, his post-trial order was quoted in full in the panel's opinion. And less than the full court participated in the decision. Judge Jorgenson heard oral argument, but passed away in the interim. And Judge Wells, who was a member of the court at the time the decision was rendered, was apparently not invited to participate.

[3/] Incidentally, the duty of care recognized by the panel is (with the exception of the majority opinion in this case) *universally* recognized. *See Restatement (Second) of Torts*, §321 ("If an actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect"); *Restatement (Third) of Torts*, §38 (Preliminary Draft No. 4) (same).

## II. SUMMARY OF THE ARGUMENT

The en banc court's decision is in express and direct conflict with decisions of this Court and other district courts too numerous to squeeze into a mere 10-page brief. We can therefore provide the Court with only a representative sampling of the conflicting decisions. In the process, we hope to demonstrate that the panel properly followed the controlling decisions of this Court on both the duty issue and the causation issue, and that the majority's contrary decision should be quashed.

## III. ARGUMENT

### A. THE DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS REQUIRING RECOGNITION OF A DUTY OF REASONABLE CARE ON THE FACTS IN THIS CASE.

For its conclusion that FPL owed no duty of care to Jill Goldberg as a matter of law, the district court relied exclusively upon its prior decision in *Martinez v. Florida Power & Light Co.*, 785 So.2d 1251 (Fla. 3d DCA 2001), *review pending*. Because of a conflict with *Johnson v. Lance, Inc.*, 790 So.2d 1144 (Fla. 1st DCA 2001), *review pending*, this Court granted review in both cases. Oral argument was held in October, 2002, and both cases are presently pending review in this Court. The Court therefore has jurisdiction to review the district court's decision in this case, without more: "We thus conclude that a district court of appeal . . . opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction." *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981). *Accord*

*Kelly v. Community Hospital of the Palm Beaches, Inc.*, 818 So.2d 469 (Fla. 2002); *Jeffries v. State*, 770 So.2d 1157 (Fla. 2000).

In addition, the district court's conclusion that FPL owed "no common law duty . . . to maintain current in the traffic light" conflicts with *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). In that case, this Court held that Dade County had an operational level duty to exercise reasonable care in maintaining its traffic lights in operable condition for the safety of the motoring public. And because that duty arose from the explicit statement in §768.21(5), Fla. Stat., that governmental entities are "liable for tort claims *in the same manner and to the same extent as a private individual under like circumstances* . . . ." (371 So.2d at 1016; emphasis in original), this holding was necessarily a holding that a private entity like FPL owes a duty to exercise reasonable care in maintaining traffic lights in operable condition for the safety of the motoring public. Most respectfully, the district court's conclusion that FPL could deliberately disable the traffic lights at a dangerous intersection -- at dusk, during rush hour, and in the rain -- with impunity, and had no duty to exercise any care thereafter for the safety of the motoring public, cannot be squared with *Commercial Carrier* in any way.[4/]

The district court's decision also conflicts with *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas*, 511 So.2d 544 (Fla. 1987), upon which the initial panel relied. In

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[4/] For similar conflicting cases, *see Dept. of Transp'n v. Neilson*, 419 So.2d 1071, 1078 (Fla. 1982) ("[T]he failure to properly maintain existing traffic control devices" and "[t]he failure to . . . warn of a known danger" constitutes actionable negligence); *Robinson v. State, Dept. of Transp'n*, 465 So.2d 1301 (Fla. 1st DCA 1985) (same).

that case, a county survey crew knowingly deactivated a traffic signal, creating a confusing situation at an intersection. This Court held that, having done so, the crew owed a duty "to take reasonably necessary steps . . . to protect the safety of passing motorists" -- "and to warn the motoring public of any known hazards that the presence of the survey crew and the accompanying deactivation and blocking of the turn lane created." 511 So.2d at 545, 547. Most respectfully, the decision below cannot be squared with that decision in any way.[5/]

Finally, the decision below plainly conflicts with *McCain v. Florida Power Corp., supra* (and its extensive progeny), in which this Court held that "a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others" -- and in which it mandated that "the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant." 593 So.2d at 503. *Accord Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001) (quashing a Third District decision that had declined to apply a *McCain* foreseeability analysis to the duty question before it, and mandating that a *McCain* analysis be applied to *all* duty questions arising in negligence cases in this state).

Although both Judge Ramirez and the initial panel followed *McCain* in their analyses, neither the majority opinion nor the *Martinez* decision, upon which the

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[5/] For similar conflicting cases, *see Bailey Drainage District v. Stark*, 526 So.2d 678 (Fla. 1988) (where intersection is not controlled with traffic lights and is dangerous because visibility of traffic on intersecting streets is obstructed, governmental entity owes a duty of reasonable care to warn motorists of danger); *Robinson v. State, Dept. of Transp'n*, 465 So.2d 1301 (Fla. 1st DCA 1985) (where DOT deactivated traffic light's left-turn signal by rendering left turn lane inaccessible, creating confusing situation, it owed a duty of reasonable care to protect and warn motorists of danger).

majority based its *ad hoc* holding of "no duty," even mention *McCain* or the concept of foreseeability. That FPL created a "foreseeable zone of risk" when it deactivated the traffic lights at the dangerous intersection -- at dusk, during rush hour, and in the rain -- is, in our judgment, simply undeniable. And as it did in *Whitt*, we respectfully urge the Court to grant review and quash the district court's decision.

### B. THE DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS SUPPORTING THE JURY'S FINDING OF PROXIMATE CAUSATION ON THE FACTS IN THIS CASE.

As an examination of the majority's opinion and the three decisions upon which the majority relied for its conclusion of "no legal cause" will reveal, in the Third District at least, intersection collisions that occur when traffic lights are inoperative -- no matter the conditions, and no matter the obstructions to sight lines across their corners -- are *always* deemed unforeseeable *as a matter of law*. We respectfully submit that this line of cases is legally indefensible. The legal test governing the issue is thoroughly settled: "the question of foreseeability as it relates to proximate causation generally must be left to the fact-finder to resolve," and the question can be decided as a matter of law only where all reasonable persons would agree that the plaintiff's injuries were "freak injuries that were utterly unpredictable in light of common human experience." *McCain v. Florida Power Corp.*, *supra* at 503-04.[6/]

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[6/] In addition, *see Welfare v. Seaboard Coastline R. Co.*, 373 So.2d 886, 888-89 (Fla. 1979), in which this Court reiterated the "three incontrovertible premises" of *Helman v. Seaboard Coastline R. Co.*, 349 So.2d 1187 (Fla. 1977) -- including the following: "[T]he question of whether defendant's negligence was the proximate cause of the injury is generally one for the jury unless reasonable men could not differ in their determination of that question. . . . Because there was some competent evidence to support the jury verdict that respondents were negligent . . . , the jury was

Judge Ramirez and the initial panel honored this test; the majority ignored it. And given the sheer number of decisions on the subject, surely the Third District must recognize at some point what common experience tells all the rest of us -- that intersection collisions are perfectly predictable when traffic lights are out at dangerous intersections -- especially at dusk and in the rain, where sight lines are badly obscured. After all, the sole reason for placing traffic lights at dangerous intersections is to prevent the collisions which will inevitably occur without them.

Other courts have been far more reasonable in recognizing the foreseeability of the type of accident that occurred in this case. In *Palm Beach Cty. Bd. of Cty. Comm'rs v. Salas, supra* at 547-48, for example, this Court squarely held that a jury question was presented on the issue of proximate causation in an action against a governmental entity that had disabled a traffic signal, where a motorist who was fully aware of the inoperable traffic light failed to yield the right-of-way to oncoming traffic and caused a collision in the intersection:

> . . . [I]t is clear that the county was a factual cause of the Salases' injuries; "but for" the creation of this dangerous situation, the accident would not have occurred. We are of the view, and we so hold, that the county could have easily foreseen that blocking off the turn lane, and deactivating the turn signal and thus leaving motorists with no guidance on if or when they could turn left, personal injury to someone was not a remote possibility. Blount's actions were not so unforeseeable that the county should be relieved, as a matter of law and policy, of all liability. . . . Blount's confusion at this busy and now more dangerous intersection was not some remote possibility, it was easily foreseeable. The fact that Blount was negligent when she turned left does not render her actions so bizarre, unusual or outside the realm of the reasonably

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concomitantly imbued with the function of deciding whether such negligence was a proximate cause of the injury."

> foreseeable that the county's actions did not also proximately cause the Salases' injuries. The county created this danger and confusion and failed to warn the motoring public . . . Under these facts, a directed verdict in favor of the county is a judicial usurpation of the jury's role.

The same, we think, can be said of the majority's decision in the instant case.[7/]

Every other district court that has confronted this issue in factual circumstances similar to those presented in this case has resolved it consistently with this Court's resolution of the causation issue in *Salas*: *Robinson v. State, Dept. of Transp'n*, 465 So.2d 1301 (Fla. 1st DCA 1985) (deactivated traffic signal); *Polk Cty. v. Sofka*, 803 So.2d 751 (Fla. 2d DCA 2001) (uncontrolled intersection; obstructed line of sight); *Clark v. Polk Cty.*, 753 So.2d 138 (Fla. 2d DCA 2000) (missing traffic control device; obstructed line of sight); *Gibbs v. Hernandez*, 810 So.2d 1034 (Fla. 4th DCA 2002) (obstructed line of sight); *Grier v. Bankers Land Co.*, 539 So.2d 552 (Fla. 4th DCA 1989) (obstructed line of sight); *Cahill v. City of Daytona Beach*, 577 So.2d 715 (Fla. 5th DCA 1991) (obstructed view of traffic control device). Most respectfully, in dishonoring the jury's fully-supported finding of fact on the proximate causation issue in this case and arrogating to itself the right to resolve this quintessentially factual issue *as a matter of law*, the majority undeniably brought itself into conflict with decisions

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[7/] It is worth noting that there was a dissent in *Salas*, which relied upon *Metropolitan Dade Cty. v. Colina*, 456 So.2d 1233 (Fla. 3d DCA 1984). A majority of this Court obviously rejected reliance on that case in *Salas*. In the instant case, however, the majority ignored *Salas* and bottomed its conclusion of "no legal cause" on *Colina* and its progeny. For a thoughtful article that is highly critical of the Third District's continued stubborn reliance upon *Colina* and its progeny, *see* Perwin, "Liability for Negligently Disabling or Failing to Repair a Traffic Signal: Absolute Immunity in the Third District?," Vol. 73 n. 7, *Florida Bar Journal* (July/Aug. 1999).

of every other appellate court in this state -- and we respectfully urge the Court to grant review and quash the district court's decision.

## IV. CONCLUSION

The Court has jurisdiction, and review should be granted.

Respectfully submitted,

By:_____

JOEL D. EATON

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of November, 2003, to: Hicks, Anderson & Kneale, P.A., 799 Brickell Plaza, 9th Floor, Miami, FL 33131; and Aimee Stein, Esq., FPL Law Department, P.O. Box 029100, Miami, FL 33102-9100.

## CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

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JOEL D. EATON